MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-908

ROBERT S. STRAUSS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Memorandum of the Government in opposition to the Petition for Certiorari herein makes absolutely no attempt to justify the decision of the Court of Appeals for the Seventh Circuit, relying wholly upon the opinion of that Court. Petitioner respectfully suggests to this Court that this Court should grant certiorari in this

cause in order to preserve the integrity of the federal judicial process, on two grounds: 1) the Sixth Amendment right to a speedy trial; and 2) basic ground of federal criminal jurisdiction.

It is clear that there is a great conflict in the decisions of the Courts of Appeals regarding the Sixth Amendment right to a speedy trial. This conflict is most pronounced between the decisions of the Seventh Circuit, out of which this case arises, and those decided by the District of Columbia Circuit. In the instant cause, the Seventh Circuit held that in order to avail himself of his constitutional right to a speedy trial, the burden was upon petitioner to show that he had been prejudiced. Absent a showing of specific prejudice, petitioner is not entitled to his constitutional rights! Indeed, the opinion of the Court of Appeals uses a rule designed to apply to pre-indictment delay to excuse post-indictment delay between accusation and trial of over a year and a half. Then, the Court commends the Government for giving a reason for this delay. Rather than a reason, however, the Government has offered nothing more than a statement that it desired to try this petitioner with his co-defendant who is described as a fugitive during this time.

Thus, petitioner is denied his constitutional right for no compelling reason other than the convenience of the Government. So easily are Constitutional rights dissipated.

Petitioner respectfully states that the proper view of this issue was stated most eloquently by the United States Court of Appeals for the District of Columbia in

United States v. *Dunn*, 10 Criminal Law Reporter 2351 (District of Columbia Circuit, January 13, 1972).

"Even by attributing the initial 60-day commitment at St. Elizabeths to appellant, which the Government does not seek to do, the total delay attributable to the Government would still be approximately 440 days. We find a delay of this nature to be both unexplainable and unjustifiable in light of the Constitution, Federal Rules of Criminal Procedure, the case law, and in fact, our entire historical and jurisprudential commitment to the concept of the speedy dispensing of justice."

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"This somewhat lengthy dissertation clearly establishes the basic nature of this fundamental right, all too frequently paid only token lip-service by the courts. . . .

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". . . We in the judiciary, as those in the other branches of government, often engage in a plethora of verbiage and a paucity of action when dealing with questions of constitutional vintage. The problem of which I speak is amply exemplified by the manner in which the courts have dealt with the Sixth Amendment guarantee to a fair and speedy trial. . . .

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". . . The Judicial Council of the United States Circuit Court for the Second Circuit has recently promulgated rules to assure the prompt disposition of criminal cases in that busy circuit. . . .

"While this undoubtedly increases the burden on all those involved in the criminal prosecution—viz., the police, the prosecutor, the defense counsel and the courts—these burdens must be borne with the ultimate realization that justice delayed is justice denied."

We are dealing with Constitutional rights, not mere rules of procedure, nor statutory dictates, nor whims and caprices. These are rights of a basic nature mandatory upon us all. This Court should grant certiorari in this cause to make it clear once and for all to all federal courts that criminal defendants, such as Petitioner herein, cannot be made to languish in prison to suit the mere convenience or whim of the prosecutor.

In addition, it is clear that the prosecution has failed to show that Petitioner has committed a federal crime. Petitioner was charged with causing the mails to be used in furtherance of a scheme to defraud. The testimony presented by the Government established that the bank personnel involved in the alleged check-kiting scheme did not know that the mails would be used in the process of clearing the checks deposited by Petitioner. If the personnel responsible for the clearing of the checks did not know that the U.S. mails were to be involved, how can it be said that Petitioner is charged with knowledge that use of the mails would follow in the ordinary course of business, or could be reasonably foreseen? Instead, the Court of Appeals recognized that "It was not the normal practice of these banks to utilize the mails in the bank collection process."

The Court of Appeals completely ignores the ruling of this Court in *Kahn* v. *United States*, 323 U.S. 88 (1944) and *Parr* v. *United States*, 363 U.S. 370 (1960), discussed in the Petition for Certiorari. The reliance of the Court of Appeals' opinion upon *United States* v. *Sampson*, 371 U.S. 75 (1965) is obviously misplaced. In that case, the mails had been used by the defendant "for the purpose of lulling [the victim] by assurances that the promised

services would be performed, even after the defendant has obtained the money from them. There was no such use of the mails here. Accidentally and incidentally and through no action or intent of petitioner, the mails were used to clear two checks which had been deposited by Petitioner. This clearing of checks was not part of any scheme alleged by the Government, and by its terms could not be used to further the scheme as alleged in the indictment.

The mail fraud statute contains clear and specific limitations. These limitations must not be ignored whenever it suits the government to do so. To repeat what this Court has said in *Parr* v. *United States*, 363 U.S. 370, 389, 80 S. Ct. 1171, 1183 (1960):

> ". . . as its terms and purpose make clear, the federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

The State of Illinois elected to dismiss the charges placed against Petitioner arising out of the series of events involved herein. The Government has failed to prove violation of any federal statute. The Government has further failed to find any defense for the obviously erroneous decision of the Court of Appeals.

Finally, the Government has noted, in passing, that the Petition for Certiorari was not filed within 30 days after the final decision of the Court of Appeals. This Court has held on numerous occasions that the provisions of Rule 22(2), Supreme Court Rules, is not jurisdictional. *Durham* v. *United States*, 401 U.S. 481, 91 S. Ct. 858, 859

(1971). Such rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U.S. 58, 64, 90 S. Ct. 1555, 1559 (1970); *Taglianetti* v. *United States*, 394 U.S. 316, 89 S. Ct. 1099, 1100 (1969). This is obviously such a case.

It is respectfully submitted that this Court grant certiorari, and reverse the judgment of conviction based upon the papers now before it. Alternatively, full consideration should be given to the serious errors of substance and procedure committed in this cause and there should be further briefing and argument.

Respectfully submitted,

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